IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 117 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SOLANKI ARUNA ALIAS ASHABEN VINODBHAI

Versus

VINOD ALIAS VINU DAHYABHAI SOLANKI

Appearance:

1. Criminal Revision Application No. 117 of 1999

MR ASHISH M DAGLI for Petitioner No. 1

MR MJ DAGLI for Petitioner No. 1

MR GA PATHAN for Respondent No. 1

RULE SERVED for Respondent No. 1

MR HH PATEL PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 29/10/2001

ORAL JUDGEMENT

#. This application is filed by the petitioner - wife of

respondent No.1 being aggrieved and dissatisfied by the judgment and order of learned Additional Sessions Judge, Court No.11, Ahmedabad passed on 11.9.1998 in Criminal Revision Application No.242/1997 whereby the learned Additional Sessions Judge allowed the Revision Application and the order and judgment passed by the learned metropolitan Magistrate, Court No.5, on 26.8.1997 for granting maintenance under Section 125 of the Criminal Procedure code in Criminal Misc. Application No.144/1993 was quashed and set aside.

#. The facts suggest that before filing of above said Misc. Criminal Application No.144/1993 8 to 6 months the present petitioner married the opponent No.1 through Hindu rites and by a marriage ceremony which was performed at Ramji Temple, Ahmedabad. In deposition thereafter the petitioner stated that the marriage took place on 30.4.1993, after the marriage the petitioner resided at the residence of in-laws. After a month of marriage life the petitioner was subjected to torture by the husband and by demand of dowry by the in-laws. The petitioner and the respondent No.1 were acquaint to each other because the respondent No.1 was working as a agent R.T.O. and the petitioner was doing work on commission for respondent No.1. As per the case of the petitioner this relationship culminated in the marriage. A complaint under Section 498 of the I.P.C. has also been filed by the petitioner. The application before the Metropolitan Magistrate came to be filed by the petitioner on 3.12.1993 by way of defence a reply was tendered by the respondent No.1 wherein the factum of marriage as pleaded by the petitioner was denied absolutely by the petitioner No.1 further stating that he was already married to one Dinaben - daughter of Maganbhai on 11.5.1989 vide Hindu rites. The marriage with the Dinaben, according to petitioner, was performed at Rakhial road, Ahmedabad at resident of parents of Dinaben and through this marriage according to petitioner No.1 they have a issue i.e. a son who was borne on 22.8.1995. While denying all the facts of the application in toto this defence was pleaded by the opponent. From the applicant's side vide Ex.3 the applicant himself vide Ex.4 Kishorbhai distant relative of applicant and vide Ex.5 Minaben friend of the applicant were examined. While on behalf of the petitioner No.1 in the above said proceeding vide Ex.7 Vinodbhai - respondent No.1, vide Ex.8 - Dahyabhai father of the respondent No.1 and witness - Bahadursinh vide Ex.9 being neighbour of respondent No.1 were examined. Both the parties attempted to produce some documentary evidence on record but none of them was proved on behalf

of any of the parties and, therefore, the case was examined solely on this oral evidence.

#. After hearing the parties and after taking into consideration written arguments on behalf of the respondent No.1 at Ex.10 learned Metropolitan Magistrate came to the conclusion that having regard to the circumstances of the case and Invitation Card for the marriage and having regard to the fact that 2 of the witnesses have deposed about the marriage which was solemnised, it appeared to the Metropolitan Magistrate that there was no reason to disbelieve this evidence on behalf of the applicant - wife. At the same time learned Magistrate observed that the evidence of the opponent was not reliable because the evidence appears to have been concocted to escape the liability to pay the maintenance to wife and hence learned Metropolitan Magistrate vide his order dated 26.8.1997 awarded an amount of Rs.300/- p.m. by way of maintenance from the date of application from the opponent - present respondent No.1 to the wife petitioner herein.

#. Thereafter respondent No.1 herein preferred Criminal Revision Application No.242/1997 in the Court of learned Additional City Sessions Judge, Court No.11 at Ahmedabad. After hearing the parties the learned Judge came to the conclusion that the evidence of the applicant was suspicious because she did not mention the exact date of the marriage with the respondent No.1 in the application and only mentioned that the marriage was solemnised before 6 to 8 months. It was further observed by the learned Additional Sessions Judge that the Magistrate relied upon a Marriage Invitation Card which was not exhibited and was not coming from the proper custody. It was further observed by the learned Additional Sessions Judge that the learned Metropolitan Magistrate carried away with the oral deposition of the opponent - wife and her witnesses PW No.2 Ex.4 and PW No.3 - Minaben Ex.5. It was further observed by the learned Additional Sessions Judge that wedding card was not produced by the applicant nor she examined the photographer who took photo of the marriage ceremony to substantiate the case of the petitioner herself and, therefore, by the oral evidence of 2 witnesses the factum of marriage was not established. The learned Additional Sessions Judge further observed that the priest who performed the marriage is also not examined. The learned Additional Sessions Judge also observed that the story as it was narrated in the application, that within one month of the marriage life the petitioner met with the torture, some valuable worth Rs.35,000/- were taken away by the in-law

etc. was in the opinion of learned Additional Sessions Judge was improbable. It was further observed by the learned Additional Sessions Judge in his judgment that the witness examined on behalf of the petitioner No.1 Ex.9 Bahadursinh states that he had never seen petitioner and respondent No.1 staying as husband and wife in the quarters in which both the spouses were allegedly staying. It was further observed that the application was filed to harass the applicant - husband and to pressurise him to settle the dispute which was in respect of some monitory transaction, because it is revealed in the evidence that the petitioner was working on commission with the respondent, therefore, learned Additional Sessions Judge came to the conclusion that the applicant - husband made out the strong case to reappreciate the evidence produced before the trial Court while exercising revisional jurisdiction and that the Magistrate misread the evidence produced before him and recorded erroneous finding and, hence, the Revision Application came to be allowed and the order passed by the learned Metropolitan Magistrate was quashed and, hence, this Revision Application by the petitioner in this Court.

#. Learned advocate Mr.A.M.Dagli, for the petitioner, learned advocate G.A.Pathan, for the respondent No.1 while learned APP Mr.H.H.Patel, on behalf of the respondent No.2 were heard.

#. Learned advocate Mr.Dagli after relying upon two decisions, one of the Apex Court in the matter of Dwarika Prasad Satpathy vs. Bidyut Prava Dixit, as reported in AIR 1999 Supreme Court 3348 and decision of this Court in the matter of Shardaben Pankajkumar Vyas vs. Pankajkumar Sureshchandra Vyas as reported in 1995 (2) GLR 1679 urged that no strict proof of marriage is required to prove the factum of marriage in an inquiry under Section 125 of the Criminal Procedure Code. It was urged that the applicant himself, his relative, Kishorbhai - Ex.4 and her friend Minaben vide Ex.5 have stated that on 30.4.1993 marriage between the petitioner and respondent No.1 were solemnized at Ramji Temple. According to Mr.Dagli this was sufficient evidence to come to a conclusion that the factum of marriage between the parties were proved. The Metropolitan Magistrate came to the right conclusion therefore it was not required to be disturbed by the learned Additional Sessions Judge in revisional powers. The grounds and the reasons which were given by the learned Additional Sessions Judge to interfere with the above said order according to learned advocate were totally erroneous. It was urged that the factum of

marriage under inquiry under Section 125 of the Criminal Procedure Code can be proved according to above said decisions of the Supreme Court as well as High Court by other mode and manner and not only by proving ceremonies of marriage. Long stay is also ground to infer the marriage but here in this case the married life, co-habitation lasted for one month only. It was urged that, however, having regard to the evidence as produced on behalf of the applicant the factum of the marriage is proved.

#. On the other hand, the learned advocate Mr.Pathan while supporting the decision of learned Additional Sessions Judge contended that it is a consistent stand of opponent that the marriage which is pleaded never took place. The father of the opponent in support of him has been examined to prove this fact. Not only that but very important witness Ex.9 Bahadursinh the neighbour of the opponent has been examined who has categorically stated that he had never seen the petitioner and opponent No.1 staying together as husband and wife at the residence of the opponent as pleaded by the petitioner. It was urged that the learned Additional Sessions Judge has rightly held that the circumstances regarding the marriage of the applicant were suspicious because the applicant did not mention the date of the marriage in the application while she deposed categorical date of marriage. It was urged that the applicant was a literate lady, according to evidence she studied upto 12th Standard, ordinarily could not miss the date of marriage so as to mention the same in the application instead of making a vague statement to the extent that the marriage was solemnized before 6 to 8 months from the date of filing of the application. It was urged that ordinarily nearest relative of one of the spouse should be examined to prove the factum of the marriage between the spouse, and neither father nor mother of the petitioner is examined to prove the fact that the marriage was solemnized. It was urged that the wedded life lasted only for one month. It was urged that the learned Additional Sessions Judge was right in holding that the story of the petitioner was improbable, that during the short span of one month the events as narrated by the petitioner would not take place. It was urged that by Ex.8 father of the opponent and by Ex.9 witness Bahadursinh it is amply proved that the opponent was married in 1989 with one Dinaben and they were staying together at the S.T.Quarters i.e. the residence of father of the opponent, therefore, even if the marriage between the petitioner and opponent No.1 is for sake of argument is solemnized then the same is void marriage as per the Hindu Law and the petitioner will not

be entitled to maintenance under Section 125 as not being legally wedded wife. Learned advocate therefore urged that the Revision Application is deserving dismissal. Learned APP Mr.Patel, for the respondent No.2 was heard.

#. Having heard learned advocate for the parties the prime question which is to be decided is whether the petitioner was able to prove her marriage with the respondent No.1. Learned advocate for the petitioner relied upon above said two decisions. It is laid down in the matter of Shardaben Pankajkumar Vyas vs. Pankajkumar Sureshchandra Vyas, decision of this Court (Supra) in Para-10, that when the question of validity of marriage is in issue, the Court is bound to address itself to the nature of proceedings in which the challenge is made, as the standard of proof of marriage and degree of evidence varies from forum to forum. The approach of the trial Magistrate in insisting upon strict proof of marriage and refusing to accept the evidence of the original applicant supported by documentary evidence in the nature of Marriage Registration Certificate placed on record in the trial Court by the concerned clerk of the office of the Registrar of Marriage, is totally perverse. This Court further observed that it is necessary for the Court concerned to address itself first that the standard of degree of proof of factum of marriage warranted in the circumstances of the case and the nature of dispute and type of forum before which it is agitated. The strict proof of marriage is required in order to find a person guilty for bigamy - Second marriage under Sec.494 of the Indian Penal Code or to prove right emerging from sacred document like Will, while same is not the standard and is not required to be insisted upon in a proceeding under Sec.125 of the Code, wherein preponderance of probability emerging from the record can well be taken into account with regard to the dispute pertaining to legality and validity of the marriage between the parties. The same view is expressed by the Apex Court in the matter of Dwarika Prasad Satpathy vs. Bidyut Prava Dixit, wherein the Supreme Court laid down that validity of the marriage for the purpose of summary proceeding under Sec.125, Criminal Procedure Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under Sec.494 of the I.P.C.

#. Having regard to the evidence on record both the Courts below have appreciated the evidence in different manner and Magistrate came to the conclusion that the

evidence was sufficient to conclude the marriage between these spouse while revisional Court decided against it and, hence this Court will have to examine the circumstances and evidence led by the applicant. The factum of the marriage between the spouse can be inferred by the long co-habitation but here in this case the co-habitation is only for one month. The circumstances which all Courts are required to be taken into consideration is the fact that no Hindu woman would assert on oath that third party is her husband. Keeping this in mind when we appreciate the evidence produced on behalf of the applicant, the applicant - petitioner has on oath sufficiently discharged the burden as regards the factum of marriage. A Hindu woman who is allegedly deserted cannot be pushed by the Courts to collect and tender strict evidence in support of her contention that she married to some person. Therefore, ordinarily the balance is tilted in favour of a Hindu wife who states on oath that she married to the certain person. She ought to be held reliable unless this is disproved by the other side by the cogent evidence. There is no rule of law that the factum of marriage under inquiry under Section 125 must be proved in certain manner and mode. What is required is to be seen that whether the evidence on behalf of the applicant inspires confidence in her favour and in her say. There is no obvious reason to disbelieve the petitioner that she would pick up opponent No.1 and label him as a husband only for the purpose of economic settlement. This is an absurd conclusion without any sound reason reached by the learned Additional Sessions Judge nor any other reason could be shown by the opponent husband that why the petitioner was alleging opponent No.1 to be her husband. Not only this but the petitioner has tried to prove her marriage through two witnesses one of them is her distant relative - Kishorbhai and another is her friend Minaben. Both of them appears to be natural witness and in the cross-examination on behalf of the opponent nothing could be brought about to disbelieve these two witnesses, when we refer to the cross-examination of the opponent of these two witnesses. We do not find anything except total and bare denial and, therefore, there is no reason to disbelieve what is stated by these witnesses. Sufficient to say that in all cases in an inquiry under Section 125 no documentary evidence is required, or to say in different words that it cannot be said that in all cases the documentary evidence is required for proving of the factum of the marriage. On the contrary, the approach should be whether on given evidence and from the state of the circumstances leading to the dispute between the spouse and having regard to the history of the litigation

whether the evidence adduced inspire confidence in favour of the petitioner wife. Learned Metropolitan Magistrate could exercise this approach and came to the right conclusion. While learned Additional Sessions Judge was totally oblivious to the fact that there was obviously no reason for wife to say that some third party was her husband and that too for some economic settlement. Thus, so far as the prime question, which arose in this matter, is concerned this Court resolve that the applicant was able to prove her marriage with opponent No.1 and that conclusion in this respect of the learned Magistrate was correct. While the learned Additional Sessions Judge erred in interfering with this conclusion of learned Metropolitan Magistrate.

##. Now, the second phase of the dispute which is raised on behalf of the opponent is that, he had already married with one Dinaben in 1989 and had an issue and, therefore, the second marriage even if it is held to be proved would be invalid marriage as per the Hindu Law and the petitioner would not be entitled to any maintenance. While examining this contention there cannot be any combat with the legal proposition that in subsistence of first marriage by a Hindu, the second marriage would be ipso facto void and cannot be considered as marriage at all. Therefore, heavy burden lies upon opponent to prove that he was married with one Dinaben and that marriage was subsisting. Ordinarily, the opponent would try to escape the liability to pay the maintenance and, hence, the evidence on material aspect on behalf of the opponent should be carefully scrutinised. For the first marriage with the Dinaben, when the best evidence was first wife Dinaben herself, the opponent husband failed to produce her as a witness. The opponent husband also failed to produce the evidence of the parents of the Dinaben to prove the factum of the marriage with the Dinaben. It must be borne in mind that the first marriage by the opponent has been countered in the matter by way of a defence of this application and standard of proof, therefore, must be strict so far the opponent is concerned. Instead there is an evidence of opponent and his father saying that a earlier marriage with Dinaben was solemnized and, therefore, firstly there was no marriage with the petitioner and even if it is held that there was a marriage then the same was void. The learned Magistrate came to the right conclusion that in absence of the best evidence which ought to have been produced by the opponent the theory of the marriage with Dinaben appears to be concocted one to escape the liability to pay the maintenance to the petitioner. The mere say of the opponent and/or his father or his neighbour would not

suffice to either dislodge the factum of marriage with the present petitioner nor would prove that there was a valid marriage subsisting with the Dinaben. The opponent so far as the marriage with the Dinaben is concerned, could have produced birth certificate of son which was borne during their wedlock as alleged on behalf of opponent. The same is not coming on record. The wife Dinaben has not been examined. There is no other evidence except the say of the opponent and his father and the neighbour whose evidence required to be carefully appreciated. This evidence cannot be relied upon in view of unimpeachable evidence of the petitioner side. The learned Additional Sessions Judge therefore clearly erred in interfering with the order passed by the learned Magistrate of awarding maintenance to present petitioner by opponent No.1. It was lastly argued on behalf of the opponent No.1 that the petitioner is able to earn the livelihood and not entitled to maintenance. There is no evidence at all on the record to denote that the petitioner is actually earning her livelihood so as to disentitle her maintenance under Section 125 of the Criminal Procedure Code.

#. In this view of the matter, this Revision Application is allowed. The order passed by the learned Additional Sessions Judge on 11.9.1998 below Revision Application No.242/1997 is hereby quashed and set aside and order of learned Metropolitan Magistrate Court No.5 passed on 26.8.1997 in Misc. Criminal Application No.144/1993 is restored. Rule is made absolute to that extent. Upon request at this juncture on behalf of learned advocate Mr.Pathan for respondent No.1, operation and implementation of this order is suspended for four weeks from today. However, it is made clear that while suspending operation and implementation of this order it will be open for the petitioner to file enforcement Application for recovery of amount of maintenance in pursuance of order of learned Metropolitan Magistrate Court No.5 and proceed further with that application.

(J. R. VORA, J.)

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